Calendar No. 424

101ST CONGRESS *1st Session*	SENATE	REPORT 101-227

CHILDREN'S TELEVISION ACT OF 1989

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

together with

MINORITY VIEWS

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 1992

NOVEMBER 22 (legislative day, NOVEMBER 6), 1989.—Ordered to be printed

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[To accompany S. 1992]

The Committee on Commerce, Science, and Transportation, having considered an original bill (S. 1992) to require the Federal Communications Commission to ensure that broadcasters provide children's television programming that meets the educational and informational needs of the child audience, and for other purposes, having considered the same, reports favorably thereon and recommends that the bill do pass.

PURPOSE OF BILL

The objective of this legislation is to increase the amount of educational and informational broadcast television programming available to children and to protect children from overcommercialization of programming. To achieve those goals, this legislation: (1) establishes limits on the amount of time that can be devoted to commercials during a children's television program; (2) requires the Federal Communications Commission (FCC) to consider at the time of license renewal whether the licensee has provided programming specifically designed to meet the educational and informational needs of pre-school and school-age children; and (3) requires the FCC to complete a pending inquiry concerning program length commercials and scrutinize more closely and more expeditiously complaints about program length commercials.

THE FCC AND CHILDREN'S TELEVISION

For the past 25 years, Federal policymakers have discussed the obligations of television broadcasters to provide programming for children. As far back as 1960, the FCC decided to include children as one of the groups whose programming needs had to be met by television broadcasters. See, Report and Statement of Policy Re: Programming, 20 RR 1901 (1960). Over a decade later, in 1974, the FCC instituted a "wide ranging inquiry into children's programming and advertising practices." See, Children's Television Report and Policy Statement, 50 FCC 2d 1, (1974), [*1974 Report*] affirmed, *Action for Children's Television* v. *FCC,* 564 F.2d 458 (D.C. Cir. 1977) [*ACT* v. *FCC*]. The FCC received comments from more than 100,000 citizens. In addition, the FCC conducted three days of panel discussions and three days of oral arguments involving a wide range of interested parties. The 1974 Report narrowed its focus to two issues: limitations on commercial practices; and the need to provide educational and informational programming.

Commercial Practices.—Based on the evidence received the FCC concluded that:

> It is a matter of common understanding that, because of their youth and inexperience, children are far more trusting and vulnerable to commercial "pitches" than adults. There is, in addition, evidence that children cannot distinguish conceptually between programming and advertising; they do not understand that the purpose of a commercial is to sell a product.

Id. at 11. See also, Report of the Surgeon General, Television and Growing Up: The Impact of Televised Violence, Vol. IV at 469, 474 (1970). It was also recognized by the FCC that "[s]ince children watch television long before they can read, television provides advertisers access to a younger and more impressionable age group than can be reached through any other medium." Id. at 11 citing *Capital Broadcasting Co.* v. *Mitchell,* 333 F. Supp. 582, 584 (1971), *aff'd* 405 U.S. (1972). In sum, the FCC concluded that "there is a serious basis for concern about overcommercialization on programs designed for children." Id. at 12.

On the other hand, the FCC recognized that it could not completely ban advertising from children's programming because that would be both unfair and counter-productive to retrict a station's ability to finance programming for children. A complete ban on advertising could result in a severe reduction in the amount and quality of children's programming. In the alternative, the FCC stated that the industry should separate more clearly programs and any commercial messages and that certain practices, such as host-selling and product tie-ins, should be eliminated. Id. at 15–16. The FCC also endorsed the industry's voluntary commercial time limits (no more than 12 minutes per hour during the week and 9.5 minutes on weekends). Id. at 12–13.

Programs Designed for Children.—There is no dispute that broadcasters have an obligation to "serve all substantial and important groups in their communities." Id. at 5. Not only did the FCC conclude that broadcasters' obligation to serve the public interest in-

cludes children, "but because of their immaturity and their special needs children require programming designed specifically for them." Id. The FCC went on to explain that:

> Children, like adults, have a variety of different needs and interests. Most children, however, lack the experience and intellectual sophistication to enjoy or benefit from much of the non-entertainment material broadcast for adults. . . . In this regard, educational and informational programming for children is of particular importance. . . . the use of television to further the educational and cultural development of America's children bears a direct relationship to the licensee's obligation under the Communications Act to operate in the "public interest."

Id. at 5. Thus, the FCC clearly found that broadcasters have a "special obligation" to serve children as a "substantial and important" community group. Moreover, the FCC admonished broadcasters that children's programming should be aired throughout the weekly schedule, not just on the weekends. Id. at 1. Although the FCC did not adopt specific rules or regulations implementing its conclusions, it expressly stated that it expected the industry to take self-regulatory steps. In addition, to monitor children's programming efforts, the FCC revised its renewal form to obtain information on commercialization practices and programming designed to serve children. The FCC also left the Docket open so that it could revisit these issues if necessary.

The FCC never has received any substantial or reliable evidence that the rationale and facts underlying its 1974 Report are no longer valid. On the contrary, five years later, the FCC, through a Children's Television Task Force, reviewed this largely voluntary policy and found that while the commercial time limits were generally being obeyed, the programming guidelines were not. Children's Television Task Force Report, Docket 19142, Vol. IV, (1979) (Task Force Report). The Task Force found that educational programming has a very positive impact on the development of children, particularly preschool children, "whose limited reading capacity restricts the range of educational resources available to them." See, 1984 Report, 96 FCC 2d at 674, n. 68, (Rivera dissent). The Task Force also found that there was a "substantial unmet demand for educational programs." Id. at 668, n. 42 (Rivera dissent).

While the Task Force did find that the amount of children's programming had increased by less than one hour per week since the guidelines were instituted, it also concluded that market forces failed to work to ensure that television programming was responsive to the needs and interests of children, because the ability of the child audience to influence this advertiser-supported industry was limited. Id. at Vol. 1, 29–35, 41–44, 76. As a result, it recommended a series of options ranging from simply relying on noncommercial television for children's programming to adopting mandatory requirements.

The FCC received comments on the Task Force's proposals, and in 1984 issued a report, Children's Television Programming and Advertising Practices, 96 FCC 2d 634 (1984) [1984 Report], Aff'd sub nom. ACT v. FCC, 756 F.2d 889 (D.C. Cir. 1985). The FCC in its

Report largely ignored the Task Force's conclusions as well as those of the *1974 Report.* While the FCC argued that the thrust of this report was to adhere to the general, voluntary obligations in the *1974 Report,* it was generally viewed as substantially lessening the FCC's concern about children's television programming. *See*, "FCC Strikes the Flag on Children's TV," *Broadcasting*, Jan. 2, 1984 ("the Commission's action constitutes a watering down of the policy statement on children's programming the Commission adopted in 1974"). The *1984 Report* concluded that broadcasters should not have any specific programming requirements or be subject to any advertising requirements. It only provided that broadcasters had a "continuing duty . . . to examine the program needs of the child part of the audience." 96 FCC 2d at 656. In sum, the FCC majority left children to fend for themselves in the open marketplace of programming, in direct contradiction of the underlying rationale.

Commissioner Rivera wrote a lengthy dissent in response to this Report. He stated that the FCC's decision not to require programming specifically designed to meet the needs of children.

> . . . ignores the substantial body of research confirming the unique characteristics of the child audience, the utility of programming especially designed for children of different ages, especially pre-schoolers, and the social benefit derived by children who watch programs designed for them.

Id. at 672–73, n. 61 citing Task Force Report, Vol. 5, Wartela, 11–37, 50; Task Force Report, Vol. 1 at 19–21. Commissioner Rivera went on to state that the FCC should have adopted a flexible children's programming processing guideline designed to increase the supply of programs that enhance the education of children and retained it until it is shown that this need can be satisfied without government intervention." 96 FCC 2d at 667–68 (Rivera Dissent).

Later the same year, the FCC again adopted a decision weakening protections for children. With hardly any analysis of the decision's effect on children, the FCC eliminated its overall quantitative commercial time limits for television licensees. See Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Logs for Commercial Television Stations, 98 FCC 2d 1076, 1105 (1984). Despite the findings in the *1974 Report* and the Task Force Report, the FCC concluded that the interests of children could be best protected by having the masrketplace work, with virtually no interference by the government. *Id.* The FCC's justification consisted only of the following:

> Elimination of the policy is consistent with [the] Commission's general de-emphasis regarding quantitative guidelines engendered in the *Report and Order*. Moreover, the Commission has consistently noted the importance of advertising as a support mechanism for the presentation of children's programming.

Memorandum Opinion and Order on Reconsideration of the [1984] Report, 104, FCC 2d 358, 370–71 (footnote omitted).

The 1984 Report was appealed, and in 1987, the U.S. Court of Appeals (D.C. Circuit) ruled that there was no evidence to support the

FCC's repeal of the advertising guidelines for children's programming and ordered the FCC to review its decision.

> For almost 15 years, the FCC's regulation of children's television was founded on the premise that the marketplace *does not* function adequately when children make up the audience. . . . The Commission has offered neither facts nor analysis to the effect that its earlier concerns over the market failure were overemphasized, misguided, out of date or just downright incorrect.

ACT v. *FCC*, 821 F.2d 741, 744 [emphasis in the original].

In response to the remand, the FCC issued a Further Notice of Proposed Rulemaking/Notice of Inquiry in 1987 seeking comments on the issue of commercialization guidelines for children's television. Although comments have been filed by numerous parties, no FCC action has been taken.

It was because of the FCC's reluctance to act to enhance children's television that the Congress believed a legislative remedy was necessary. Last year, the Congress passed H.R. 3966, the Children's Television Act of 1988, which was identical to this Congress' S. 707. Because that legislation was pocket-vetoed, the Congress is again considering legislation to impose children's programming requirements on television broadcasters.

FINDINGS CONCERNING CHILDREN'S TELEVISION

Our children are this nation's most valuable resource, and we need to pay special attention to their needs. Study after study has demonstrated that students in the United States are lagging badly behind those of the rest of the world. Today, we are finding that far too many of our children cannot read, add and subtract, or understand the meaning of important events.

There are an estimated 42 million children in this country, and they each spend anywhere from 11 to 28 hours a week watching television in their homes. By the time most children reach the age of 18, it is estimated that they will have watched between 15,000 and 20,000 hours of television, while they will have spent less than 13,000 hours in school. Furthermore, children are exposed to television long before they are exposed to any formal education.

In this connection, television has been shown to be an efficient and effective way to reach and educate children both in the home and in school. See, The National Endowment for Children's Educational Television Act of 1989, S. Rept. 100-66, July 11, 1989, [Endowment Report]. Moreover, there is a great deal of evidence that television can teach children effectively. A recent study published by the Department of Education concluded "contrary to popular assertions, children are cognitively active during television and attempt to form a coherent connected understanding of television programs." See, Anderson, Daniel, The Inpact on Children's Education: Televisions Influence on Cognitive Development, U.S. Department of Education, Working Paper No. 2, April 1988; See also, S. Hrg. 101-69, April 12, 1989 (testimony of Daniel Anderson).

Moreover, studies on the impact of television programs designed to teach children specific skills conclude that these programs are effective. For example.

> . . . Viewing Mister Rogers Neighborhood leads to increased prosocial behavior, task persistence and imaginative play. . . . [By watching] Sesame Street . . . preschool children learned many of the skills and concepts taught on the program. . . . Even a skeptical interpretation of the data concluded that children learned letter and number skills from unaided viewing. . . . Viewing at ages 3 and 4 is associated with improved vocabulary and prereading skills.

See, Huston, Watkins and Kunkel, "Public Policy and Children's Television," American Psychologist, February, 1989.

Children's educational programming is most effective when it is designed to focus on particular age groups and address specific skills. The Electric Company was created to teach basic reading skills to 6 to 11 year-olds who were not reading at their grade level. "Although designed primarily for viewing in the home, The Electric Company has been the most widely used television series in American classrooms." See, Endowment Report, quoting Testimony of David Britt, President, Children's Television Workshop. Studies done by the Educational Testing Service to determine the effectiveness of The Electric Company demonstrated that children's reading skills improved significantly as a result of exposure to the program. Moreover, the targeted viewers of the show—second graders in the bottom half of their reading class—showed greater reading acheivement gains due to viewing The Electric Company than did their non-target viewer segments. In addition, the study concluded that minority children benefited as much as non-minority students from veiwing the program. Ball, S. and G.A. Bogatz, Reading with Television: An Evaluation of the Electric Company, Princeton, N.J., Educational Testing Service, 1973 (ERIC Document Reproduction Service No. ED 073 178); Ball, S. et al. Reading with Television: A follow-up Evaluation of The Electric Company, Princetion, N.J., Educational Testing Service, 1974 (ERIC Document Reproduction Service No. ED 122 798)

More recent shows have been demonstrated to have a similar impact. 3-2-1 CONTACT is designed to present a wide variety of scientific concepts to 8 to 12 year-olds (particularly girls and minorities). All of the studies on the impact of the program on children have concluded that the students learned and retained many of the concepts taught on the program. Johnston, Jerome and Richard Luker, The Eriksson Study: An Exploratory Study of Viewing Two Weeks of the Second Season of 3-2-1 CONTACT, Ann Arbor, Michigan: Institute for Social Research, University of Michigan, 1983.

Square on TV, a new mathematics program on public broadcasting, "has been shown to be a means of stimulating interest and excitement among students in this country." See, Endowment Report at 5-6. Although the program has been most effective where viewing is encouraged and incorporated by teachers, even unaided children learn from Square One TV. See, Peel, Tina, Alex Rockwell, Edward Esty, and Kate Gonzer, Square One TV: The Premiere Week Study, New York: Children's Television Workshop, March, 1987;

Reading Rainbow, targeted to 5-to-8-year-olds, is designed to, and does, encourage children to read. This program works. According to teachers and librarians, children who watch the program actually go to school and the library to request the featured books. In addition, sales of books featured on the show have increased dramatically. "Books that would sell 5,000 copies on their own sell 25,000 copies if they are on Reading Rainbow." Mimi Kayden, Director of Children's Marketing for the publisher E.P. Dutton, quoted in Chen, Milton and Wiliam Marsh, "Myths about Instructional Television: A Riposte," Education Week, May 24, 1989.

Finally, the questions most asked concerning educational programming are whether children will watch educational programming without being forced by their parents and whether children in low-income communities will watch educational programming in their home at all. The answer to both questions is yes. The evidence presented to the Committee demonstrates that "in the 1980's children from all socioeconomic groups watch educational programming somewhere in the neighborhood of three to four hours a week." See, Endownment Report at p. 6. "Over 11 million adults and children watch [Sesame Street] in this country today. Nearly 53 percent of the households with children under 12 and with income under $15,000 tune in." See, Endownment Report. In 1978, the Daniel Yankelovich organization tracked the viewership of Sesame Street in four Black and Hispanic low-income, urban neighborhoods and found that 96 percent of the preschoolers in New York City's Bedford-Stuyvesant and East Harlem neighborhoods, 91 percent in the Chicago neighborhoods, and 97 percent in the Washington, D.C. neighborhoods watched the series. Yankelovich, Skelly, & White, Inc., A Trend Report on the Role and Penetration of Sesame Street in Ghetto Communities, October, 1978.

Today, public television is the primary source of educational children's programming in the United States, broadcasting over 1,200 hours of children's educational programming for home viewing. However, our children watch more than just public television. Commercial television does provide meritorious programming designed to teach pro-social behavior to children, thus demonstrating that it is possible for commercial broadcasters to provide this fare. However, when viewed as a whole, there is disturbingly little educational or informational programming on commercial television.

There have been some noteworthy educationally imortant programs on commercial television, such as Fat Albert and the Cosby Kids, produced in the 1970's. "That program dealt with many issues of importance to children such as drugs, divorce, friendship, child abuse, and children understood the messages in the program." See, Endowment Report. What set that program apart from the average commercial television program was the fact that the host (Bill Cosby) would interrupt the program at regular intervals and review what happened and let the children viewers know what to look for in the next segment. In other words, the purpose of each show was reinforced repeatedly during the program.

Other examples of worthwhile children's programs on commercial television that encourage pro-social behavior and informational programming include CBS Television Network's Pee Wee's Playhouse, a half-hour live action program that includes entertainment

and informational material, and CBS Schoolbreak Specials, which present original contemporary dramas that educate children about the conflicts and dilemmas they often confront. The CBS Schoolbreak Specials are part of a "Read More About It" project that CBS has conducted for many years with the Library of Congress. In addition, CBS distributes "Teachers' Guides" to thousands of schools to highlight the instructional value of the Specials.

ABC Television Network's programming schedule also includes programs based on books that are designed to encourage reading—ABC Weekend Specials and its Saturday morning show, Winnie the Pooh and Friends. Monthly, ABC offers Afterschool Specials, dealing with problems youths face in everyday life. It also offers a weekday evening show, Life Goes On, which deals with the life of a retarded child and emphasizes pro-social values.

The NBC Television Network also airs valuable children's programming. On Saturday mornings it offers The Smurfs, which is aimed at children ages 2–11 and designed to encourage pro-social behavior, and Saved by the Bell, aimed at high school students, and addressing typical problems and conflicts faced by teens. NBC, like the other two networks, also includes a monthly series, Prime Time Family Specials, based on books that children are encouraged to read.

A number of stations produce their own programming designed to serve the educational and informational needs of children. For example, WSOC-TV, Charlotte, NC, produces The Great Intergalactic Scientific Game Show, which teaches children aged 3–9 basic scientific concepts. WTJA(TV), Altoona, PA produces Action News for Kids, a weekly news program for and by kids.

In addition to concerns about the nature of children's programming, there are concerns about the limited time devoted to children's fare. Most children's programming is relegated to a limited number of time slots: on weekdays, two hours in the morning (7 am—9 am), three in the afternoon (3 pm—6 pm), and on Saturday morning, five hours (7 am—12 am), for a total 30 available hours each week. See, Watkins, Bruce, "Improving the Educational and Informational Television for Children: When the Marketplace Fails," Yale Law & Policy Review, Vol. V, No. 2, Spring/Summer 1987, at 362. While this may seem like a large number of program hours, each station does not normally fill all of this time with children's programming. Further, when programs are aired that children can watch, they are most often reruns of adult or family comedy, variety, or dramatic programs. The network owned and affiliated stations devote their afternoons to soap operas and adult talk shows, not children-oriented programming. On an average of one day a month during the school year, each of the networks will air an after-school special. The independent stations tend to offer programs for children during the week; however, most of their programming consists of animated cartoons, often with products associated with them.

The networks provide children's programming on the weekends, but the overwhelming majority of the programs are entertainment programs—that is, animated cartoons. The independent offerings on the weekend tend to consist primarily of reruns of adult situation comedies and family dramas. Id.

In sum, despite the FCC's contention that market forces should be sufficient to ensure that commercial stations provide educational and informational children's programming, the facts demonstrate otherwise. The same problems with children's programming that the FCC found in 1976 exist today. Market forces have not worked to increase the educational and informational programming available to children on commercial television.

COMMERCIALIZATION PRACTICES AND CHILDREN'S TELEVISION

Recent studies concerning the impact of commercial matter on children have reached the same conclusions as the FCC's 1974 Report and the Task Force Report: young children have a difficult time distinguishing commercials from programming. See, Comments of the American Psychological Association in Revision of Programming and Commercialization Policies, FCC Docket 83-670, filed Feb. 1988. Specifically, "children under six are generally unable to recognize the persuasive intent of television commercials. . . . Overall, the weight of the evidence suggests that the ability to recognize persuasive intent is not developed until about the age of seven-eight years." Id. at 7-8.

The FCC's current policy of not restricting commercials in children's programs is based on the faulty assumption that the marketplace will work to keep the number of commercials during children's programs at a reasonable level. In other words, if the viewers feel there is too much commercial matter, they will turn off the program. However, since young children do not have the cognitive ability to distinguish commercial matter from program matter, they cannot react negatively to overcommercialization of programming.

Moreover, since the FCC has lessened its oversight, it is well documented that there has been a significant increase in the amount of commercial matter broadcast during children's programming and that there has not been a corresponding increase in the amount of educational or informational programming broadcast for children.

According to the National Association of Broadcasters (NAB) Children's Television Commercialization Survey prepared in 1988, the average children's program contains 8:38 minutes of commercial matter per hour. However, the survey also demonstrates that 17.2 percent of the children's programs broadcast in the largest 20 television markets averaged more than 12 minutes per hour of commercial matter, and 7.6 percent averaged more than 13 minutes per hour. In the television markets ranked 21-50, 20 percent of the children's programs ran more than 12 minutes per hour, and 7.8 percent ran more than 14 minutes per hour. Prior to 1984, broadcast licensees were required to note each instance that advertising in their children's programs exceeded the commercial guidelines. According to the NAB survey, four years later, nearly one of every five children's programs broadcast was averaging more than 12 minutes per hour of commercial matter. Furthermore, according to a study conducted by Action for Children's Television in the fall of 1988, some weekend children's programming contained as much as 11-12 minutes per hour of commercial matter, and some stations

during their weekday children's programming carried up to 14 minutes per hour of commercial matter.

This increase in commercial matter during weekend children's programming is further documented by statistics submitted to Telecommunications Subcommittee of the House Energy and Commerce Committee by the three television networks. According to their data, commercial matter carried during children's programming on the weekends has increased significantly since 1984. Prior to 1984, all three networks reported that the amount of commercial matter during children's programming was at or below 9.30 minutes per hour. Today, two of the networks now report offering as many as 11 minutes of commerical matter during children's programming carried on Saturday.

Thus, despite the fact that young children have difficulty distinguishing between commercials and programs, it is clear they are subject to an ever increasing level of commercial matter on over-the-air Television. Our Nation's children, who according to the FCC's own findings, are most vulnerable to commercial material, are subjected to increasing amounts of commercial matter. Accordingly, the Committee believes that it is important that we take steps to afford some protection to our nation's children through the reported bill.

After the Committee ordered this bill reported, a hearing was held to consider whether to restrict the amount of commercial time on children's programs on cable. At the hearing, evidence was presented that the same rationale for restricting commercial matter during children's programming on over-the-air television applies to such programming on cable television—most young children are unable to distinguish commercial matter from program matter, and they are especially vulnerable to commercial matter, See e.g., Testimony of Bruce Watkins, American Psychological Association, October 18, 1989.

The Committee also heard that there are a number of cable networks that carry children's programs, have advertiser support, and run commercial material during these programs, including Arts and Entertainment (8 min/hr), CNBC (9.5 min/hr), The Discovery Channel (9 min/hr), Niclelodeon (8 min/hr), The Family Channel (12 min/hr), Lifetime (12 min/hr), Superstation TBS (9.5 min/hr), TNT (9.5 min/hr), and USA Network (12 min/hr). Thus, the majority of cable programmers that carry commercial matter during children's programming do not exceed the limits proposed in the reported bill. (12 minutes per hour on weekdays and 10.5 minutes per hour on weekends). The three programmers that carry 12 minutes of commercial matter per hour of children's programming may be required to reduce the commercial matter carried on the weekend. However, none of the cable programmers would be required to reduce the amount of commercial matter carried on the weekdays.

CONSTITUTIONALITY OF LEGISLATION

The Committee examined closely the constitutionality of this legislation. It determined that imposing reasonable commercial time limits and an affirmative obligation on licensees to serve the special needs of children in no way would violate the Constitution.

The Supreme Court long has recognized Congress' authority generally to regulate broadcasting "in the public interest, convenience and necessity" through the vehicle of the Communication Act of 1934 (the "Act") and FCC rules and regulations. In 1969, the Supreme Court affirmed that because radio spectrum is not available to all, broadcast licensees have a duty to act as fiduciaries for the public. *Red Lion* v. *FCC,* 395 U.S. 367, 388–389 (1969). A fundamental part of that duty is the obligation to serve children, who constitute a unique segment of the television audience. The FCC has recognized the importance of protecting children in both its 1974 Report, 50 FCC 2d 1, and its 1984 Report. The Committee fully concurs in that assessment. It is clear that this special responsibility of broadcast licensees towards the child audience encourages speech to a group that would not otherwise receive it. Finally, as has been often stated, it is "the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion,* 395 U.S. at 390.

The Department of Justice, in recent letters to Senator Hollings, the Chairman of the Committee, has asserted that *Red Lion,* "is no longer good law in view of the technological changes in the broadcast media.[1] However, as set forth in detail in this Committee's Report on the Fairness in Broadcasting Act of 1989 (S. Rept. 101–141), this Committee strongly disagrees with the Department of Justice's conclusion.

In *Red Lion,* broadcasters argued, much as critics of the Fairness Doctrine and other broadcast regulation of broadcasters argue today, that technological developments since the *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943), decision had reduced the scarcity of broadcast facilities to the point that the challenged rules were no longer a permissible attempt to further other First Amendment values and increase opportunities for speech. The Court rejected these contentions. The scarcity of spectrum permitting broadcast regulation does not turn on the absolute number of broadcast facilities overall or in particular markets, but rather on whether many more people want to broadcast than there are available frequencies or channels. The Court observed that "comparative hearings between competing applicants for broadcast spectrum space are by no means a thing of the past." 395 U.S. at 398. The Court further held that "nothing in this record or in our own research convinces us that the resource is no longer one for whcih there are more immediate and potential uses than can be accommodated . . .". *Id.* at 399. The Committee believes this conclusion remains correct. Demand for broadcast frequencies still far exceeds supply, and governmental licensing and regulation is necessary to resolve competing claims to these frequencies.

The Department of Justice is thus simply wrong in sloughing aside this allocational scarcity and instead focusing on overall numbers of broadcast or other electronic outlets, or comparing broadcast outlets to the number of daily newspapers. The Department of Justice conveniently overlooks the fact that *Red Lion* was a radio case, and in 1969 the Court was informed that there were

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[1] See, October 4, 1989 Letters to Senator Hollings from Carol T. Crawford, Assistant Attorney General, concerning S. 1215 and S. 707, respectively.

6900 radio stations—over four times the number of daily newspapers. The Department of Justice is thus in the position of arguing that broadcast regulation is constitutional at 6900 outlets, but impermissible at 12,000 (today's number).

The Department of Justice relies heavily upon *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), where the Supreme Court held that a state statute which provided for a right to respond to newspaper attacks upon candidates for public office was unconstitutional. But the Department of Justice has again swept aside the fundamental distinction between the print media and broadcasting. In broadcasting, the Government first sets aside spectrum for broadcasting as against other competing uses, such as land mobile radio; in allocating spectrum for broadcasting, the Government reasonably determined that the allocation should provide for the establishment of local outlets and contribute to an informed citizenry. It follows that the Government can adopt policies and rules to insure that its allocation of the scarce resource is not undermined—that in broadcasting, the operation does constitute an effective local and informational outlet.

Even more important, because of the allocational scarcity discussed above, the Government must select among competing applicants for available broadcast frequencies, which then prevents everyone else from using the frequencies. The Government therefore reasonably and constitutionally determined that the broadcast licensee must act as a trustee or fiduciary for all those in the community or area kept from use of the frequency by the Government. As the Supreme Court held in *Red Lion,* it is the First Amendment rights of all those excluded by Government licensing that are "paramount" here. The broadcast scheme, based on the need to deal soundly with allocational scarcity, thus differs entirely from the print area, where there is no governmental licensing to prevent engineering chaos and there is no government exclusion. Where the Government is bestowing a mass media privilege in a field "inherently not open", it can constitutionally prevent manipulation of that scarce privilege in the *private* interest and ensure its dislocation to the *public* interest. The Supreme Court has consistently reaffirmed the scarcity and public trustee ratinales, while upholding regulation of broadcasters against First Amendment attack. Four years after *Red Lion,* in *Columbia Broadcasting System Inc.* v. *DNC,* 412 U.S. 94 (1973), the Court reiterated the scarcity rationale for broadcast regulation:

> The broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcast is subject to an inherent physical limitation. Broadcasting frequencies are a scarce resource; they must be portioned out among applicants.

Id. at 101.

In *FCC* v. *National Citizens Committee for Broadcasting,* 436 U.S. 775 (1978), the Court upheld FCC regulations prohibiting cross-ownership of newspapers and broadcast stations against First Amendment challenge. While conceding that the regulations were "designed to further the First Amendment goal of achieving diversity of information", both broadcasters and newspapers argued that the

rules violated the First Amendment rights of newspaper owners. *Id.* at 799. In response, the Court observed that:

> [T]he physical limitations of the broadcast spectrum are well known. Because of problems of interference between broadcast signals, a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public. In light of this physical scarcity, government allocation and regulation of broadcast frequencies are essential as we have often recognized . . . We see nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the "public interest" in diversification of the mass communications media.

Id.

That this still represents the view of the Supreme Court is confirmed by its most recent opinion on the subject in *CBS, Inc.* v. *FCC,* 453 U.S. 367 (1981). While *NCCB* emphasized the scarcity rationale in upholding broadcast regulation, *CBS, Inc.,* unequivocally reaffirmed that broadcasters must still be considered public trustees whose licenses are conditioned upon continued service in the public interest. In *CBS, Inc.,* the Court upheld a limited right of access of federal candidates to broadcasting facilities established in 47 U.S.C. 312(a)(7). In rejecting the broadcasters' First Amendment challenge, the Court cited *United Church of Christ* and again reaffirmed that "a licensee is 'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise, it is burdened by enforceable public obligations.'" 453 U.S. at 395, *quoting Office of Communications of United Church of Christ* v. *FCC,* 359 F.2d 997, 1003 (D.C. Cir. 1966) [*United Church of Christ* v. *FCC*]. The Court recognized that this access section of the Act "represents an effort by Congress to ensure an important resource—the airwaves—will be used in the public interest." 453 U.S. at 397.

The Court's holding in *CBS, Inc.* establishes that the argument of the Department of Justice is without merit. This legislation imposes no unconstitutional conditions on the grant of broadcast licenses and upon the exercise of First Amendment rights. As the Court in *CBS, Inc.* states, such an argument is simply inapplicable in the context of broadcasting. Similarly, in *FCC* v. *NCCB,* the Court rejected an argument that the Commission's cross-ownership restrictions "unconstitutionally condition[ed] receipt of a broadcast license upon forfeiture of the right to publish a newspaper," noting, *inter alia,* that the purpose and effect of the regulations was "to promote free speech, not to restrict it." 436 U.S. at 800–801. The import of these cases is that the government may properly impose conditions on the use of broadcast frequencies, such as the condition embodied in this Act.

Arguments by opponents of this legislation that the Supreme Court has more recently undermined the constitutional underpinnings are misplaced. The Supreme Court consistently has reaffirmed that the scarcity of broadcast frequencies—the scarcity relative to demand for frequencies which permits govermental licensing in the public interest—allows such reasonable regulations.

Most recently in *FCC* v. *League of Women Voters of California*, 468 U.S. 364 (1983), the Court reiterated that:

> [T]he fundamental distinguishing characteristic of the new medium of broadcasting that, in our view, has required some adjustment in First Amendment analysis is that '[b]roadcasting frequencies are a scarce resource [that] must be portioned out among applicants.'

468 U.S. at 377, *quoting Columbia Broadcasting System Inc.* v. *Democratic National Committee*, 412 U.S. at 101. The notion that a broadcaster is a public trustee similarly has been reaffirmed. In addition, the Court recognized the "substantial governmental interest" in "insuring adequate and balanced coverage of public issues" served by the Fairness Doctrine. 468 U.S. at 380.

The Department of Justice, in attacking the scarcity basis of *Red Lion*, is arguing that the entire broadcast regulatory scheme in Title III is unconstitutional—that the broadcaster need not operate in the public interest or as a public trustee for its community but rather is free to program as it pleases, despite the bedrock allocational scheme. We have shown that this drastic overturning of four decades of Supreme Court precedents in wholly unfounded. The legislation here involved is integrally involved with operation of a broadcast station in the public interest and the public trustee obligation. They are thus constitutional We also note here a further obstacle to the Department of Justice position. For in its letter, the Department of Justice makes no effort to address the Supreme Court decisions recognizing Congressional power to regulate programming aimed at children, even where the exercise of such power over adults would be prohibited by the First Amendment. In *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 749 (1978), the Court stated:

> We held in *Ginsberg* v. *New York*, 390 U.S. 629, that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their household" justified the regulation of otherwise protected expression.

Recognition that children are a unique and special concern of the State encompasses all media. State action aimed at protecting children has repeatedly overcome First-Amendment-premised attacks whether the regulation concerned was written work, cinematography, radio or television. Government has a right to "adopt more stringent controls on communicative materials available to youths than on those available to adults." *Erznoznik* v. *Jacksonville*, 422, U.S. 205, 212; *See, Ginsberg* v. *New York*, 390 U.S. 629, 636 41 (1968); *Miller* v. *California*, 413 U.S. 15 (1973). This results from the fact that "a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantee." *Ginsberg* v. *New York*, 390 U.S. at 649–650, (Stewart, J., concurring in result). *See also, Renton* v. *Playtime Theaters, Inc.*, 475 U.S. 41 (1986).

More recently, in the 1987 decision in *Action for Children's Television* v. *FCC*, 821 F.2d 741, the U.S. Court of Appeals for the D.C. Circuit acknowledged that "throughout its examination of chil-

dren's television, the FCC has been sensitive to the limits imposed by the First Amendment on its regulatory efforts." *Id.* at 731, n.l. The Court referred to the FCC's *1974 Report,* 50 FCC 2d at 3, citing *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 390; and 96 FCC 2d. 634 652 (1984). The Court continued by stating that "[e]arly on in its efforts with respect to children's television, the FCC carefully emphasized that '[a]lthough the unique nature of the broadcasting medium may justify some differences in the First Amendment standard applied to it, it is clear that any regulation of programming must be reconciled with free speech consideration." *ACT* v. *FCC,* 82 F.2d 741, 744, n.l.

Regulation which particularly limits the amount of commercial matter broadcast in a program at a children's audience clearly meets established constitutional standards. Commercial speech is susceptible to more stringent governmental limits and regulation because "the Constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas* v. *Public Service Commission,* 447 U.S. 557, 563 (1980); citing 436 U.S. 447 at 456–7.

Central Hudson set forth a three-prong test for determining the constitutionality of limitations on commercial speech. 447 U.S. at 566. Assuming commercial speech concerns lawful activity and is not misleading, (1) there must be a substantial government interest served by the restriction; (2) the restriction must directly advance that Government interest; and (3) the restrictions must be no more extensive than necessary to serve that Government interest.

A proposal to limit the quantity of commercial time during children's programming fully meets this three-part test. The "substantial Government interest" sought to be protected by such legislation as well as stated by Judge Starr in *ACT* v. *FCC,* 821 F.2d 741, 743, where he pointed out the FCC's own policy statement that young children could not distinguish conceptually between programming and advertising, and that guidelines on the permissible level of commercialization are a recognition of the vulnerability of children to commercial exploitation. This recognition is by no means new or unique. It was acknowledged by the industry itself during the period of self-regulation under the National Association of Broadcasters code. Most importantly, it was ackowledged in the FCC's *1974 Report.* Thus, the record, including leading authorities, establishes that failure to create and maintain proper guidelines would irresponsibly allow our children to become the captive audience of advertisers.

Similarly, the proposed Congressional restriction meets the second *Central Hudson* test in that it directly advances a Government interest. The governmental interest in this case, as was recognized in the FCC's *1974 Report,* is that children should not be overly or excessively exposed to commercialization because of their youth and limited ability to understand advertising concepts. A proposal which seeks to limit the amount of commercial exposure is precisely the type of focused governmental action required by the second prong of the *Central Hudson* test.

Finally, the proposed Congressional legislation is no more extensive than necessary to serve the affected governmental interest because it is narrowly focused and specifically limited in application

to children's programs. The time limits are manifestly reasonable; indeed, they are generally less stringent than those voluntarily adhered to by broadcasting pursuant to the *1974 Report*.

The narrow and relatively nonintrusive nature of this regulation is underscored by comparison with restrictions on other types of commercial advertising. For example, the Supreme Court has validated prohibitions against the advertising of products or services such as cigarettes, alcohol, and gambling, which in themselves are perfectly legal, but which are nevertheless recognized as harmful. *See, Posadas de Puerto Rico Associates* v. *Tourism Co.*, 106 S.Ct. 2968 (1986); *Capitol Broadcasting Co.* v. *Mitchell*, 1333 F.Supp. 582 (1971); *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds*, 467 U.S. 691 (1984). The limits set forth in this legislation are far less restrictive than the complete bans on cigarette, alcohol, and gambling advertising which the courts repeatedly have upheld. Since Congress has determined that excessive advertising during children's programming is harmful, such advertising certainly can be limited in quantity.

LICENSE RENEWAL

The Committee strongly believes that it is well within the First Amendment strictures to require the FCC to consider, during the license renewal process, whether a television licensee has provided programming specifically designed to serve the educational and informational needs of children in the context of its overall programming. It is now well established that in exchange for "the free and exclusive use of a valuable part of the public domain", a broadcaster can be required to act as a public fiduciary, obligated to serve the needs and interests of its area. *See, Red Lion; United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983); *Office of Communications of United Church of Christ* v. *FCC*, 359 FCC 2d at 1003. The Court stated in *Red Lion* that the FCC does not violate the First Amendment by "interesting itself in the kinds of programs broadcast by licensee." *Id. See also, FCC* v. *NCCB*, 436 U.S. 775, 799–800 (1978) ("Requiring those who wish to obtain a broadcast license to demonstrate that such would serve the 'public interest' does not restrict the speech of those who are denied licenses . . ."). The FCC is not simply a traffic cop, but rather has the obligation "of determining the composition of that traffic". *NBC* v. *U.S.*, 319 U.S. 190, 215 (1943).

As part of their public interest obligation, broadcasters can and indeed must be required to render public service to children. Children are the bedrock upon which our society rests. *See, Prince* v. *Massachusetts*, 321 U.S. 158, 168 (1943). As demonstrated elsewhere in this report, children watch a great deal of television, especially before they start school, and are greatly influenced by this medium. Under these circumstances, the broadcaster as a public fiduciary must provide programming specifically designed to serve the informational and educational needs of children.

Significantly, the FCC has so held, and has been affirmed by the court. *See, 1974 Report*, 50 FCC 2d 1, 5–6, aff'd, *ACT* v. *FCC*, 564 FCC 2d 458:

> The broadcaster's public service obligation includes a responsibility to provide diversified programming designed to meet the varied needs of the child audience. In this regard, educational or informational programming for children is of particular importance. It seems to us that the cultural development of America's children bears a direct relationship to the licensee's obligation under the Communications Act to operate in the "public interest."

The FCC's 1984 Report, despite its overall weakness, still stressed the public service obligation of broadcasters and concluded that there is a duty on each licensee to examine the program needs of the unique child audience and "to be ready to demonstrate at renewal time its attention to those needs." 96 FCC 2d 654. The above statutory provision simply makes clear that the television licensee must be able to show at renewal that it has rendered public service to this unique audience.

Such public service obviously cannot consist solely of meeting the entertainment needs of children, any more than it would in the case of adults. *See, FCC* v. *WNCN Listeners Guild,* 450 U.S. 582 (1981) (establishing that entertainment is properly a matter for the marketplace.) Rather, the programming must also educate or inform the child. *See. 1974 Report,* 50 FCC 2d at 5–6. Of course, entertainment programming, including that not specifically designed for children, can contribute in this respect. *See, 1984 Report,* 96 FCC 2d at 650. What is critical, as stated by the FCC, is that the public service needs of this unique audience, so vital to our Nation's growth, be served.

Under *Red Lion,* there can be no question of the constitutionality of the provision. In *FCC* v. *League of Women Voters of California,* 468 U.S. 634, the court did apply a "substantial interest" and "narrowly tailored" test after noting that it traditionally followed a different approach in evaluating First Amendment issues in the broadcast field. The interest here involved, promotion of the welfare of our children, is indisputably substantial. That is why this audience is regarded as unique and requiring special attention by all television licensees. *See, 1974* and *1984 Reports.* Indeed, it is difficult to think of an interest more substantial than the promotion of the welfare of children who watch so much television and who rely upon it for much of the information they receive. It is this interest which has justified "channeling" of other constitutionally-protected speech, such as "indecent" programming. *See, FCC* v. *Pacifica Foundation,* 438 U.S. 726. The FCC has recently found that "to promote the content-neutral and significant governmental interest in safeguarding the well-being of the Nation's youth" is constitutionally permissible, *citing Renton* v. *Playtime Theatres,* 106 S.Ct. 925 (1986). Thus, there can be no doubt as to the substantiality of this governmental interest.

In addition, the provision here is narrowly and appropriately tailored to accomplish this substantial interest. It does not exclude any programming that does in fact serve the educational and informational needs of children; rather the broadcaster has discretion to meet its public service obligation in the way it deems best suited. The provision requires that television broadcasters act in the

public interest in this important regard and that the FCC at renewal obtain assurance that they have done so. The Committee strongly believes this is a reasonable and permissible requirement under the public interest standard. *See, Office Communication of the United Church of Christ* v. *FCC,* 707 FCC 2d 1413, 1427–28 (D.C. Cir.).

Legislative History

Other children's television legislation was introduced by Senator Metzenbaum and cosponsored by Senator Lautenberg (S. 707, the Children's Television Act of 1989) and by Senator Wirth with Senators Metzenbaum and Lautenberg as co-sponsors (S. 1215, the Children's Television Education Act of 1989). A hearing was held on S. 707 and S. 1215 on April 12, 1989. Last Congress, H.R. 3966, which was identical to S. 707, passed both the House and the Senate and was pocket vetoed by the President. In open executive session on October 5, 1989, the committee ordered reported, without objection, an original bill.

Summary of Major Provisions

Section 3 of this legislation limits the amount of time that can be devoted to commercials during a children's television program to 10.5 minutes on the weekends and 12 minutes on the weekdays.

Section 4 of this legislation requires the FCC to consider at license renewal whether the licensee has provided programming specifically designed to meet the educational and informational needs of pre-school and school-age children.

Section 5 of this legislation requires the FCC to complete a pending inquiry concerning program length commercials and requires the FCC to consider expeditiously and scrutinize closely any complaints involving program length commercials for programs aimed at children.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following costs estimate, prepared by the Congressional Budget Office.

U.S. Congress,
Congressional Budget Office,
Washington, DC, November 21, 1989.

Hon. Ernest F. Hollings,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed the Children's Television Act of 1989, as ordered reported by the Senate Committee on Commerce, Science, and Transportation, October 5, 1989. We expect that enactment of the bill would cost the federal government about $50,000 in fiscal year 1990.

The bill would limit the duration of advertising in children's programming to no more than 10.5 minutes an hour on weekends and 12 minutes an hour on weekdays. The bill would require the Feder-

al Communications Commission (FCC) to initiate a rulemaking proceeding to establish the necessary standards. In addition, the FCC would be required to consider in its review of an application for renewal of a television broadcast license (1) whether the station has complied with the time limitations, and (2) whether the station has served the educational and informational needs of children.

Based on information from the FCC, CBO estimates that the rulemaking proceeding would cost about $50,000 in fiscal year 1990. We expect that the other provisions of the bill would have no significant budget impact.

No costs would be incurred by state or local governments as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them. The CBO contact is Douglas Criscitello.

Sincerely,

ROBERT D. REISCHAUER,
Director.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation:

NUMBER OF PERSONS COVERED

This legislation requires the FCC to adopt additional regulations restricting commercial advertising during children's television programming and requiring television stations to provide programming designed for children. As a result, television stations in this country will be subject to some additional regulation.

ECONOMIC IMPACT

This legislation requires the FCC to adopt rules and regulations concerning advertising during children's television programming and requiring television licensees to provide certain children's programming to be considered by the FCC when licenses are renewed. The FCC has pending a rulemaking proceeding concerning television licensees' advertising practices, which could be expanded to include the standards to be considered in renewing licenses. Therefore, this provision should not create the need for additional staff at the FCC.

PRIVACY

This legislation will not have any adverse impact on the personal privacy of the individuals affected.

PAPERWORK

There may be a slight increase in the paperwork requirements of the FCC because of the need to establish rules and regulations implementing this legislation.

SECTION-BY-SECTION

SECTION 1.—SHORT TITLE

This section states that the short title of the bill is the "Children's Television Act of 1989."

SECTION 2.—FINDINGS

This section enumerates the findings made by Congress concerning children and television:

(1) Television can be an effective and entertaining method of imparting both educational and informational material to children.

(2) Broadcasters have an obligation to serve the public interest and as a part of this obligation have a responsibility to serve the special needs of children.

(3) In order to fund the production and acquisition of programming for children, broadcasters rely on financial support from advertisers.

(4) Children require special protection from over-commercialization in television.

(5) Television station operators and licensees must take into consideration the unique characteristics of the child audiences when programming their stations.

(6) Accordingly, it is necessary that the FCC take the actions required by this legislation.

SECTION 3.—STANDARDS FOR THE CHILDREN'S TELEVISION PROGRAMMING

Subsection (a) of this section requires the FCC to conduct a rulemaking proceeding to prescribe standards for commerical television broadcast licensees concerning the amount of time devoted to commercial material during children's television programming. This rulemaking proceeding must begin 30 days after enactment of this legislation and be completed within 180 days after enactment. In effect, the Committee is providing the broadcasting community this time to make adjustments in programming and practices to incorporate the advertising requirement imposed by subsection (b).

Subsection (b) of this section mandates that the standards established under subsection (a) require commercial television broadcast licensees to limit the duration of advertising in children's programming to not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays. These limits are somewhat less than the time some broadcasters now devote to commercials during children's programming. These limits are slightly greater than those voluntary limits established by the FCC from 1974 until they were eliminated in 1984 (9.5 on the weekends and 12 on the weekdays). Further constraints on commercial time might reduce the revenue available to support the acquisition and production of new children's programming. Accordingly, the Committee determined that it would not be productive to impose lower limitations on the commercial time while simultaneously increasing broadcasters' obligations to provide programming for children. These specific limits reflect an "estimate of the amount of advertis-

ing time needed to make children's programming economically viable." See, testimony of Bruce Watkins, Senate Commerce Committee Hearings on Commercial Matter on Children's Programming Carried on Cable, October 18, 1989; See also, S. Hrg. 101-221, at 55 (Testimony of Edward O. Fritts, President, National Association of Broadcasters).

The Committee intends that the definiton of "commercial matter", as use in subsection (a), will be consistent with the definition used by the FCC in its former FCC Form 303. Under Form 303-C, the FCC defined commercial matter to include commercial continuity (advertising message of a program sponsor) and commercial announcements (any other advertising message for which a charge is made, or other consideration received). Specifically included in the definitions of commercial matter were: "Bonus spots"; "trade-out spots"; promotional announcements by a commercial television broadcast station for or on behalf of another commonly owned or controlled broadcast station serving the same community; and promotional announcements of a future program where consideration were received for such an announcement or where such announcement identified the sponsor of the future program beyond mention of the sponsor's name as a integral part of the title of the program.

The FCC's former Form 303-C defined the following as not being commercial announcements: promotional announcements (except as defined above); station identification announcements for which no charge was made; mechanical reproduction announcements; public service announcements; announcements made pursuant to section 73.1212(d) of the FCC's Rules that materials or services had been furnished as an inducement to broadcast a political program involving controversial public issues; and announcements made pursuant to the local notice requirements of sections 1.580 (pregrant), 1.594 (designation for hearing), and 73.1202 (licensee obligations) of the Rules. For the purposes mentioned above, the FCC defined a Public Service Announcement (PSA) as any announcement for which no charge was made and which promoted programs, activities, or services of Federal, State, or local governments (e.g., recruiting or sales of bonds) or the programs, activities, or services of nonprofit organizations (e.g., United Givers Fund or Red Cross blood donations) and other announcements regarded as serving the community interests, excluding time signals, routine weather announcements, and promotional announcements.

The Committee further notes that former FCC Form 303 defined a program as an indentifiable unit of program material, logged as such, which was not an announcement as defined above (e.g., if within a 30 minute entertainment program a station broadcast a one-minute news and weather report, this news and weather report was not to be separately logged and classified as a one-minute news program and the entertainment portion as a 29 minute program).

As with the FCC's former application of commercial time guidelines, the Committee expects the FCC in its enforcement of this section to make allowances in its guidelines and regulations for situations where the violation of the commercial time limits and the number of hours affected are *de minimis*. The Committee expects

the FCC to enforce the new time standards in a manner similar to and consistent with its former processes.

To determine what programming segments will call for the commercial time limits provided in this section, the FCC should refer to the definition of "Programs Designed for Children" set forth in the former FCC Form 303-C. Section 3B(iv) of Form 303 provided that programs designed for children "include programs originally produced and broadcast primarily for an audience of children 12 years old and under. This does not include programs originally produced for a general audience which may nevertheless be significantly viewed by children."

The Committee notes that it has not substantially addressed the important areas of separation of programming and commercial material or host-selling, tie-ins, and other practices which take unfair advantage of the inability of children to distinguish between programming and commercial content, because these areas are now covered under the 1974 Report. No change in these policies or existing law pertinent to those policies is intended or mandated, and it is the Committee's strong belief that the provisions of the bill are consistent with these policies.

As reflected in section 5 of this Act, the Committee recognizes that there is a pending controversy before the FCC as to whether certain types of children's programming constitute "program length commercials" or otherwise improperly interweave programming and commercial matter. The Committee has not dealt with the controversy except to require the FCC to complete its pending Further Notice of Proposed Rulemaking/Notice of Inquiry, Docket 83-670, (rel. Nov. 7, 1987) within 180 days of enactment of this legislation. The Committee does not intend to affect the regulation of the controversy by enactment of this legislation.

Subsection (c) of this section provides that after January 1, 1993, the Commission has the authority (1) to review and evaluate the standards prescribed under subsection (b) of this section; and (2) after notice and public comment and receipt of evidence of the need to modify such standards, to alter such standards to better serve the public interest.

SECTION 4.—CONSIDERATION OF CHILDREN'S TELEVISION SERVICE IN BROADCAST LICENSE RENEWAL

This section requires the FCC, when reviewing an application for renewal of a television broadcast license, to consider whether: (1) the licensee has met the standards required to be prescribed under section 3 of this Act; and (2) whether the licensee has provided programming specifically designed to serve the educational and informational needs of pre-school and school-aged children.

While the renewal standard provision in H.R. 3966 did not specify that broadcasters must provide programming designed specifically for children, the House report language and a Senate floor colloquy that accompanied that legislation made clear that broadcasters could not simply meet their programming obligation by putting on adult oriented shows that children might also watch. See, Cong. Rec. October 19, 1988 at S. 16861; H. Rept. No. 100-675 at 19. Instead, broadcasters had to put on programs specifically designed for

children. In order to make this requirement clear, the bill reported by the Committee includes and expands this report language as statutory language. Under the reported bill, the FCC can still consider general audience programming, but it also must consider whether the licensee has provided educational and informational programming that was produced specifically for pre-school and school-aged children. The appropriate mix is left to the discretion of the broadcaster.

The Committee believes that it is important to require broadcasters to provide programming specifically designed for pre-school and school-aged children because of the overwhelming evidence that such programming has the most impact on children's development. Both the record in the FCC's children's proceedings and the record in the Senate are replete with evidence that programming aimed at children of specific ages is far more effective at teaching or informing children. Children, particularly young children, have much more difficulty following general audience programming. While they may find it interesting to watch, they do not learn much from it.

The Committee does not intend that the FCC interpret this section as requiring a quantification standard governing the amount of children's educational and informational programming that a broadcast licensee must broadcast to have its license renewed pursuant to this section or any section of this legislation.

The Committee believes that a broad range of programming can be used to meet the standard of service to the child audience required by this section. the Committee notes that general purpose programming can have an informative and educational impact (*see, 1984 Report;* 96 FCC 669, n. 39) and thus can be relied upon by the broadcaster as contributing to meeting its obligation in this important area. General audience programming, however, is not sufficient to meet the special needs of children. If it were, there would be little reason for this provision, since marketplace forces already lead to such programming. Because of the important role television plays, as noted earlier, some additional requirements are necessary. Each broadcaster must demonstrate that it has served its child audience with programming which is designed to meet the unique educational and informational needs of children, taking into account the special characteristics of various segments of the child population in order to have their license renewed.

The Committee notes that an essential element of this legislation is that broadcasters, as public trustees, report to the FCC their efforts in this respect and that copies of these reports be maintained in the stations public files. These reports shall include the programming that the licensee believes serves the educational and informational needs of children, a brief description of such programming, and the date and time of presentation.

For purposes of the record-keeping required by this section, broadcasters may include the information in the quarterly issues list they presently are required to maintain in their public file, or maintain separate files and update them annually. Broadcasters have the discretion to choose which method to employ. This legislation does not require the FCC to enforce a new interim filing requirement. Broadcasters, however, must send their children's tele-

vision lists contained in the public files to the FCC at the time the FCC is considering their licenses of renewal. The Committee recognizes that this last requirement distinguishes this material from all other community issue-oriented programming. That is the Committee's explicit intent.

The Committee expects licensees to be in compliance with the programming standard set forth in this section within one year of enactment of this legislation. To facilitate compliance with this Act, the Committee directs the FCC to provide prompt notice of the requirements of this Act.

SECTION 5.—PROGRAM LENGTH COMMERCIAL MATTER

Subsection (a) of this section requires the FCC to conclude its Rulemaking/Notice of Inquiry initiated in 1987 on program length commercials within 180 days of enactment of this legislation. See, Further Notice of Proposed Rulemaking/Notice of Inquiry, Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements MM Docket No. 83-670, (rel. Nov. 9, 1987). This proceeding was initiated in response to the U.S. Court of Appeals order remanding the FCC's decision to eliminate the commercial time limitations on children's programming. In addition, the FCC determined that it was appropriate to consider the issue of whether it should adopt any guidelines relating to children's programs associated with specific toys or other children's products and programs that contain signalling information designed to interact with toys. This proceeding has been pending at the FCC for two years, and no action has been taken. In view of the concerns raised regarding the issue of programming with associated products, the Committee believes that it is important for the FCC to complete its examination of the issue.

Subsection (b) of this section amends section 317 of the Act to add a new subsection (f) to require the FCC to consider the cognitive abilities of child audiences when considering complaints under section 317 involving a children's television program. In addition, the FCC must act on these complaints within 90 days. It has long been recognized that young children often have difficulty distinguishing between commercials and programs. Thus, section 317 complaints involving children's programs should be reviewed more carefully than programs aimed at adults, who have the ability to discern the difference between program and commercial material.

The requirement to take into account the cognitive abilities of children is intended to ensure that, whenever children's broadcast material requires sponsorship identification, such an identification will be presented in a manner reasonably designed to assist children in understanding it. It is recognized that some children, particularly very young children, may not be able to understand fully the concept of sponsorship no matter how it is explained. Nevertheless, broadcasters are expected to make reasonable efforts to take into account the cognitive abilities of children in the presentation of sponsorship identification that is required under section 317.

Rollcall Votes in Committee

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following description of the record votes during its consideration of S. 1992:

During the debate on S. 1992, Senator Burns offered an amendment in the nature of a substitute, which was identical to the text of S. 707. On a rollcall vote of 12 yeas and 8 nays as follows, the Burns amendment was defeated:

YEAS—8	NAYS—12
Mr. Danforth	Mr. Hollings
Mr. Packwood [1]	Mr. Inouye
Mr. Pressler [1]	Mr. Ford
Mr. Stevens [1]	Mr. Exon
Mr. Kasten	Mr. Gore
Mr. McCain [1]	Mr. Rockefeller [1]
Mr. Burns	Mr. Bentsen [1]
Mr. Lott	Mr. Kerry
	Mr. Breaux
	Mr. Bryan
	Mr. Robb
	Mr. Gorton

[1] By proxy.

Next Senator Danforth offered an amendment that the FCC rule on children's television advertising, required under the bill, be applied to cable television operators as well as broadcasters. During the ensuing debate, Senator Danforth agreed to withdraw the amendment pending a hearing within the Committee to consider the appropriateness of applying the requirement to both cable television and broadcasting. Subject to the agreement that Senate floor action on the bill would be postponed for a month and that the hearing and another executive session would be held before then, the bill was agreed to by voice vote.

Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

Communications Act of 1934

Section 317 of That Act

ANNOUNCEMENT WITH RESPECT TO CERTAIN MATTER BROADCAST

Sec. 317. (a) * * *

(b) through (e) * * *

(f) When the Commission receives a complaint alleging a violation of this section regarding a children's television program, the Commission shall act on such complaint within 90 days, and in reaching a decision, it shall take particular account of the cognitive abilities of children.

MINORITY VIEWS OF MR. BURNS

Last year, Congress overwhelmingly passed a comprehensive children's television bill, H.R. 3966, to improve commercial television programming. That bill was the product of a great deal of hard work and negotiations by Members of Congress, the broadcasting industry, and public interest groups. Before that consensus was reached, the broadcasting industry had never before acquiesced to legislation to regulate children's television.

That legislation represented such a positive step forward that this Committee did not deem it necessary to have the bill referred to it, much less to hold hearings on it. Instead, the bill was held at the desk, and the Senate agreed to it by voice vote.

The pocket veto of that bill by President Reagan has returned children's television legislation to the top of this Committee's agenda. S. 707 is identical to last year's bill. It remains the logical, sensible, and consensus approach to this issue, and stands the best chance of avoiding another veto by the executive branch. Unfortunately, the bill reported by this Committee appears destined to force us into a game of legislative "chicken" with the House of Representatives and the administration. The real losers of such a game, however, are our Nation's children.

S. 707 would accomplish several important goals. For the first time, limits on advertising minutes in children's programming would be established in statute. For the first time, a television licensee's obligations to serve the educational and informational needs of children in its overall programming would be established in statute. Those obligations would be tied to the renewal or loss of the station's license to operate. Finally; the bill would send an unmistakable signal to the FCC, broadcasters, and the public about the importance of children's programming.

While S. 707 would achieve those ends, it does so in manner that reflects the sensitive First Amendment issues that are woven throughout all programming issues. S. 707 provides broadcasters with the essential programming flexibility and editorial discretion that is needed to avoid jeopardizing their constitutional rights. While the Department of Justice has informed this Committee that it will recommend a veto of S. 707 if it passes, I am not persuaded by their reasoning in this instance. S. 707 constitutes the only true consensus Congress is likely to achieve on children's television, and I would urge the President to sign it into law.

Unlike S. 707, S. 1992 has number of significant flaws. The majority would ask Congress to gloss over these important issues:

—The bill invites First Amendment challenges because of its detailed intrustions into programming and advertising content.

—The bill ignores the value of family programming and the learning children acquire from it.

—The bill ignores the nature of television viewers and video marketplace. Over-the-air television primarily is a mass medium. The child audience is relatively small. It is even smaller when segmented into pre-school and school-aged categories. The time periods during which these audiences are potential viewers also are limited. These audiences now are served by the programming on public television—which is age-specific—and by varied fare offered on numerous commercial stations that have found these sudiences to be a special niche. Thus, these audiences already are being served, even if not in the exact manner in which some children's television advocates might like. There is no justification for mandating in statute that every over-the-air station program to those very limited audiences. Further, given their size, the economics of the video marketplace do not justify this multiple programming mandate. Licensees will not be able to support the cost of the programming through their advertising-supported medium. This will be worsened by the commercial time limits included in this bill.

—The bill ignores other programming options in the video marketplace, such as family-oriented and children's programming available on cable services and videocassettes. This Committee is treating over-the-air broadcasting in a statutory and regulatory vacuum.

—The bill does not provide for a "phase-in" of it stringent renewal standard. It is not clear that age-specific children's programming exists in a quantity and quality that will permit licensees to meet this bill's mandates. Thus, it may be impossible for most stations to comply with these new requirements, and their licenses will be placed in jeopardy.

—The bill may affect the general economic health of the broadcasting industry by encouraging the shift of advertisers to other media not covered by the new requirements, especially cable.

—The bill would impose substantial new record-keeping requirements on television licensees.

—The bill will lead to endless litigation over compliance. Because of the age-specific programming mandates and program length commercial provisions contained in this legislation, the FCC In effect will have to become expert in child development.

—The bill is likely to cause unintentional pre-judging of disputes on whether programs are program length commercials, because of its instruction to the FCC to consider the "cognitive ability" of children. If children, particularly pre-schoolers, are found to have difficulty discriminating between program and commercial matter, then any children's programming that involves a character attached to a product in any other context may be found to be a program length commercial. This possible outcome will make it even more difficult for televison licensees to produce children's programming and to gain advertiser support of such programming.

In short, S. 1992 goes well beyond the appropriate boundaries of what is needed to promote more and better television for our Nation's children. As a result, I am unable to support it, and I would urge the President to veto such legislation if it passes. Instead, I will continue to urge my colleagues to support S. 707.

CONRAD BURNS.

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